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SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1963

No. 319

CARIBBEAN FEDERATION LINES,

Petitioner

vs.

KARL DAHL and HJALMAR WIIK,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

CARIBBEAN FEDERATION LINES,

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KARL DAHL and HJALMAR WIIK,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Caribbean Federation Lines prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 29, 1963 (Application for Rehearing denied on May 22, 1963).

OPINIONS BELOW

The opinion of the District Court for the Southern District of Alabama (R. 35) is reported at 202 F.Supp. 890. The opinion for the Court of Appeals for the Fifth Circuit (R. 105) is reported at 315 F.2d 370 (5th Cir. 1963).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 29, 1963 (Application for Rehearing denied on May 22, 1963.), and a copy thereof is appended to this petition in the Appendix at page 12. The Jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

In suits under the penalty wage statute, 46 U.S.C.A. 596, the Respondents, Karl Dahl and Hjalmar Wiik, sought double wages from January 26, 1959 through February 26, 1960, a period of three hundred ninety-five days, at $13.33 a day and $10.83 a day respectively. The Petitioner, Caribbean Federation Lines, contended that since the vessel on which the Respondents were seamen was, at the time of the discharge of the Respondents, under a charter to load railroad cross ties in Mobile for carriage to Seven Rivers, Canada, the Respondents did not come within the provisions of 46 U.S.C.A. 596. This contention was based upon the provisions of 46 U.S.C.A. 544 which specifically provides that the penalty wage statute shall not apply to sail or steam vessels engaged in trade between the United States and the British North American posses-

sion. If not engaged in trade between the United States and a British North American possession, then, it was contended, the voyage was a coastal voyage, one from Pascagoula, Mississippi to Mobile, Alabama, in which event the penalty wage provisions do not apply. The Petitioner also contended that, arguendo, Respondents are entitled to penalty wages, then under the provisions of 46 U.S.C.A. 596, they are entitled to only one month's wages upon discharge. The Court of Appeals for the Fifth Circuit nevertheless found that the Respondents were entitled to penalty wages under 46 U.S.C.A. 596, because the vessel was en route to Mobile, Alabama from Pascagoula, Mississippi when she broke down, and hence had not begun the voyage from Mobile to Seven Rivers, Canada. In addition, it also awarded damages for breach of the contracts of employment, which greatly exceeded one month's wages. The questions presented are:

1. Whether a seaman on a vessel en route to Mobile, Alabama from Pascagoula, Mississippi under a charter to deliver cross ties to Seven Rivers, Canada is engaged in a voyage between United States and a British North American possession and hence specifically excluded from the penalty wage statute?

2. Whether a seaman on a vessel en route to Mobile, Alabama from Pascagoula, Mississippi is engaged in a coastwise voyage other than between Atlantic and Pacific ports and hence not covered by the penalty wage statute?

3. Whether the decision of the Fifth Circuit Court of Appeals in the present case conflicts with the case of the Fourth Circuit on the same question in *Gardner v. The J. N. Danzler*, 281 F.2d 719 (4th Cir. 1960)?

Whether the burden was on the Respondents in the District Court to prove that they came under the provisions of 46 U.S.C.A. 596 and were entitled to penalty wages under that statute?

STATUTES INVOLVED

The pertinent provisions of 46 U.S.C.A. 544, 46 U.S.C.A. 596 and 46 U.S.C.A. 563 are set forth in the appendix at Page 12.

STATEMENT

These suits under the penalty wage statute arise from the discharge of two seamen from the vessel, "S S AMIGO", on January 21, 1959. The basic facts which are not in dispute, are as follows: THE PETITIONER, Caribbean Federation Lines, is a Liberian corporation of Monrovia, Liberia and owner of the vessel, "S S AMIGO". Respondents, both citizens of Norway, entered into contracts for a year's employment with Otto Henrichsen, master of the S S AMIGO, in Bergen, Norway, on November 15, 1958 (R. 19). Following execution of the contracts, Respondents left Norway for New York on November 27, 1958 arriving in New York on November 29, 1958 (Petitioner's Exhibit One, Page 5 and Petitioner's Exhibit Three, Page 6). The District Court found that Respondents joined the S S AMIGO at Pascagoula, Mississippi on December 4, 1958 (R. 35). The vessel left Pascagoula on December 23, 1958 for Mobile. Prior to reaching Mobile, the engine broke down and she was taken by tug and towed to the Alabama Drydock at Mobile arriving on December 14, 1958 (Petitioner's Exhibit One, Pages 6 and 7). Thereafter all of the crew were paid off and dis-

charged with the exception of the Captain and Respondents (R. 36 and Petitioner's Exhibits One and Three, Pages 8 and 9 respectively).

At the time of the breakdown of the vessel, there was an outstanding charter to carry creosote railroad ties from Mobile, Alabama to Seven Rivers, Canada. Following the breakdown, an extension of time was requested on this charter, but no extension was granted because the St. Lawrence River was closed to navigation about that time of year because of icing. Petitioner was unable to find employment for the vessel and decided to lay up the vessel and wait until such time as the market would improve to enable a resumption of operations. This was the reason for the discharge of the crew, with the exception of Captain Henrichsen and Respondents (R. 76, 77). The Respondents remained aboard the vessel performing their duties until January 21, 1959, when they were advised by the Master the vessel was being laid up and that they were being discharged (R. 36). Upon being notified that they were being discharged, Respondents were advised to report to the company's office in New York City (R. 36). The Respondents left Mobile on January 21 and arrived in New York on January 22, 1959.

The District Court made the following Findings of Fact (R. 36-38) as to what occurred when Respondents presented themselves to Petitioner's office in New York City:

> "Upon presenting themselves to the offices of the vessel's owner, Caribbean Federation Shipping Line, in New York City on January 22, 1959, checks made out to the respective libelants covering the payment of these wages, plus $20.00 subsistence allowance to each officer

were tendered to the libelants. These checks bore the wording 'final settlement, wages and maintenance, a sign-off SS AMIGO'. In addition, the president of the corporation owning the vessel had airplane tickets for return to Norway for both officers. However, neither the wages nor the transportation was unconditionally tendered, and in fact, these payments were conditioned upon both officers executing full releases, which had been prepared for their execution. The release of libelant Dahl read as follows:

> 'We herewith hand over to you our check in the amount of $188.96, covering your full wages, plus $20.00 maintenance.
>
> You fully agree that you are no longer under our employment and that you do not have, nor will you present any claims of any nature against the SS AMIGO, its owners or agents. Your contract has been terminated in this manner by mutual agreement.'

"The release called for the signatures of the vessel's agent and Karl Dahl, chief engineer. The release tendered to libelant Wiik for his execution was identical, except for the appropriate changes in the name and the amount of payment.

"The libelants refused to accept the payments under the circumstances."

From the above facts the District Court concluded that there was not a sincere bona fide offer of re-employment and further that if the offer of re-employment was bona fide, that the existing conditions (that is, the wrongful discharge, the living conditions aboard the vessel, and the ill feeling that had been engendered

between Petitioner and Respondents) constituted reasonable grounds for the Respondents' rejection of the offer of re-employment (R. 41).

In arriving at the amounts of the judgments, the District Court, in its conclusions of law, made the following calculations (R. 44, 45), viz:

> "1. Libelant Karl Dahl, at the time of his discharge, January 21, 1959, was entitled to wages due in the amount of $468.96. Wages for the breach of contract through November 1959, a period of 8 months, 26 days (deducting the 28 days that the libelant had other employment), figured at $400.00 per month, total $3,546.58. Subsistence for the period January 23, 1959, through January 27, 1959, 5 days at $12.00 per day, totals $60.00; and for the period beginning January 28, 1959, and running through April 7, 1959 (deducting the 10 day period he was an inpatient of the Hospital) 60 days' subsistence at $7.00 per day totals $420.00. Costs of Dahl's cure total $373.50. Thirteen months or 395 days of penalty wages beginning January 26, 1959, and running through February 26, 1960, doubling said 395 days, make a total of 790 days at $13.33 per day, or $10,530.70 for penalty wages. The total award, so calculated, to said libelant, Karl Dahl, would be in the amount of $15,299.74. 'Libelant Hjalmar Wiik was entitled to wages due at the time of his discharge, January 21, 1959, in the amount of $363.96. Wages for the breach of contract through November 15, 1959, a period of 9 months, 24 days, figured at $325.00 per month, total $3,185.04. Subsistence for the period January 23, 1959, through January 27, 1959, 5 days at $12.00 per day, totals $60.00; and for the period

beginning January 28, 1959, and running through April 7, 1959; 70 days at $7.00 per day totals $490.00. Thirteen months or 395 days' penalty wages beginning January 26, 1959, and running through February 26, 1960, doubling said 395 days, make a total of 790 days at $10.83 per day, or $8,555.70 for penalty wages. The total award, so calculated, to the said libelant, Hjalmar Wiik, would be in the amount of $12,654.70."

The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court below and held that the Respondents were entitled to penalty wages under 46 U.S.C.A. 596. The Court of Appeals held that the vessel on which Respondents were seamen was not engaged in a voyage between the United States and a British North American possession, viz., Seven Rivers, Canada. Neither the District Court nor the Court of Appeals made any finding, however, as to whether or not the vessel was engaged at the time of breakdown in a coastwise voyage from Pascagoula, Mississippi to Mobile, Alabama.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets 46 U.S.C.A. 596, in light of the provisions of 46 U.S.C.A. 544 and the SHIPPING COMMISSIONER'S ACT, 46 U.S.C.A. 563. Either the decision below is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Gardner v. Ira L. N. Danzler*, 281 F.2d 719 (4th Cir. 1960), or, if it is not so in conflict, the issues are of far reaching importance left undecided in that case and must be decided. In either event, this Court should grant review.

1. The essential purpose of the double wage provisions of 46 U.S.C.A. 596 is to penalize and it is so regarded in the maritime industry. Therefore, Respondents are to be entitled to penalty wages only if they are within the class of seamen entitled thereto under Section 596. One who claims a penalty under a statute has the burden of proving the existence of the facts entitling him to the penalty, and must bring his case clearly within the statute. In *Mahar v. Gartland S.S. Co.*, 154 F.2d 621 (2d Cir. 1946) the Court said:

> "A careful reading of Section 596 (formerly Section 4529) negates any such intention on the part of Congress. The imposition of the penalty of double wages results from the master's neglect or refusal to make payment 'in the manner hereinbefore mentioned * * *' i.e., when due as prescribed by the first part of Section 596, which refers only to the time of payment of seamen employed on coastwise or foreign bound vessels. Unless the seaman can show his wages are 'due him as provided in the preceding section (Section 596),' we do not see how he assert any claim to the double wage penalty. We agree with the trial Judge that if there is no right to double wages under Section 596, there can be none under 597."

In *Gardner v. The L. N. Danzler*, supra, affirming *Gardner v. The L. N. Danzler*, 177 F. Supp. 736, (E. D. Va. 1959), Judge Haynsworth of the Court of Appeals for the Fourth Circuit traces in considerable detail the history of Sections 596, 544, and related sections, and concludes that it was the intent of Congress that Section 596 applied to "coasting vessels" only where such vessels utilized commissioners to ship their crews. In this case the Court clearly rejected the argument that by the 1898 amendment 46 U.S.C.A. 596 was made

applicable to all coastwise voyages. If applicable only to coastwise trade where vessels utilize shipping commissioners to ship crews, it follows that Section 596 was not made applicable to vessels engaged in trade between the United States and British North American possessions. The language of Section 596, after the 1898 amendment, does not even purport to cover or affect vessels engaged in the United States British North American possession trade.

The evidence in this case shows that when the vessel left Pascagoula on December 13, 1959, she was under charter to load railroad cross ties in Mobile for carriage to Seven Rivers, Canada. Canada is a British North American possession within the meaning and intent of 46 U.S.C.A. 544. *Johnson v. Standard Oil Company of New Jersey*, 33 F. Supp. 982 (DC Md. 1940).

The undisputed facts further show that because of the breakdown and the time required to repair the vessel, she was unable to fulfill her obligations under the charter, and such charter was therefore cancelled; and further that Petitioner, being unable to find immediate employment for the vessel due to market conditions, decided to lay up the vessel and wait until such time as the market conditions improved so as to enable the vessel to resume operations. However, having been engaged in trade between the United States and a British North American possession at the time the vessel was laid up, we submit she would continue in such trade until such time as other or different trade was undertaken. Therefore, under the clear and unambiguous language of the statutory provisions here involved, Respondents are not within the class of seamen entitled to penalty wages. The burden was on them, we submit, to clearly establish that they are entitled to recover penalties as provided by 46 U.S.C.A. 596. This they failed to do and, in awarding such penalties, we sub-

mit that District Court for Southern District of Alabama and the United States Fifth Circuit Court of Appeals was in error.

Even if the vessel were engaged in coastwise trade because of the voyage from Pascagoula to Mobile, we submit that the penalty wage provisions of 46 U.S.C.A. 596 are still inapplicable since Respondents did not sign on before a commissioner as authorized by 46 U.S.C.A. 563. *Gardner v. The L. N. Danzler*, supra. It is undisputed in this case that the Respondents did not sign on the S/S AMIGO before a shipping commissioner.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

APPENDIX

46 U.S.C.A. 596 – "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within 24 hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever happens first; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the Court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage . . . . "

46 U.S.C.A. 544 – "None of the provisions of Sections . . . 591 – 596 . . . of this Title shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and the Pacific coasts . . . or in the trade between the United States and the British North American possessions."

46 U.S.C.A. 563 – "Coast Guard officials to whom the duties of shipping commissioner have been delegated may ship crews for any vessel engaged in the coastwise trade, or the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or the Republic of Mexico, at the request of the master or owner of such vessel."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19927

CARIBBEAN
FEDERATION LINES, Claimant,
Appellant,

versus

KARL DAHL and HJALMAR WIIK,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(March 29, 1963)

Before JONES and BELL, Circuit Judges, and GROOMS, District Judge.

GROOMS, District Judge: This is an appeal from a decree awarding Appellees Dahl and Wiik the sum of $13,299.74 and $10,654.70, respectively, against the SS AMIGO, her claimant and stipulator, for wages due, wages for the breach of contracts, penalty wages, subsistence, and cost of cure as to Dahl.[1]

[1] 202 F. Supp. 890.

Appellees signed one-year contracts of employment with the master of the Amigo, a Liberian flag-vessel, in Bergen, Norway, on November 15, 1958, under the terms of which Dahl was engaged as chief engineer of the Amigo, at wages of $400.00 a month, and Wiik as chief mate of the vessel at $300.00 a month, shortly increased to $325.00 a month. The engagement was for the Gulf Trade — West Indies and Overseas Trade, and could be terminated by either party upon giving fourteen days' notice after one year.

On December 4, 1958, Appellees joined the vessel in the Port of Pascagoula, Mississippi. The crew was not working. Some of the gear and equipment was inoperative, and the vessel was in a state of disrepair. Living conditions were poor. After repairs to her winches, her heavy cargo of logs from South America was discharged, and she departed, on December 13, for the Alabama Dry Dock at Mobile, Alabama. En route, her engines broke down and she was towed by a tug to her destination at Mobile where her entire crew, with the exception of the master and Appellees, was paid off and discharged.

Appellees remained aboard the vessel performing their duties until January 21, 1959, when they were advised by the master that the vessel was being laid up, and that they were being discharged. They were given letters of recommendation by the master, advising that their services had been satisfactory and that the reason for their separation from employment was that their vessel was being laid up.

Upon arriving at the office of the owner in New York City on January 22, 1959 Appellees were tendered checks for services performed to the date of their discharge plus

$20.00 subsistence allowance to each. Each check bore the notation "Final settlement, wages and maintenance, a sign-off SS Amigo." The president of the owning corporation had airplane tickets for their return to Norway. The tender of wages and transportation was upon the condition that each officer would execute a written release which recited that the check covered "your full wages, plus $20.00 maintenance," and further provided:

> "You fully agree that you are no longer under our employment and that you do not have, nor will you present any claim of any nature against the SS Amigo, its owners or agents. Your contract has been terminated in this manner by mutual agreement."

Appellees refused to accept payment under those conditions. They remained in New York City until April 7, 1959, awaiting repatriation. Through the efforts of the United States Immigration and Naturalization Services, the owners or agents supplied them with airplane tickets to Norway. While awaiting repatriation, Appellees incurred subsistence expenses, and Dahl had to be hospitalized for pneumonia. Their repeated efforts to obtain employment during the contract period, except for 28 days for Dahl, were unsuccessful.

The libel was filed on February 6, 1959, and was assigned for first trial on February 26, 1960, and finally heard on February 3, 1961. The court found that by the exercise of due diligence by the Appellees the action could have been heard on the first trial date.

Appellant seeks a reversal on four principal contentions. It says that Appellees (1) are not within the class of seamen entitled to penalty wages under 46 U.S.C. 956,[2] but if so, they (2) are entitled in addition to earned wages to a sum equal in amount to one month's wages as compensation upon their discharge, and no more, under 46 U.S.C. 594[3]; that the court erred in holding (3) that there was no bona fide offer of reemployment or, in the alternative, that Appellees had reasonable grounds for the rejection of such offer; and (4) that the penalty wages awarded are excessive, considering all the equities.

The record fails to reveal a reliance upon Section 594 in

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[2] "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

[3] "Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

the lower court, and Appellees rightfully insist that Appellant cannot here urge the applicability of that section. Admiralty Rule 26, 28 U.S.C.; *The Beneluch*, D.C. S.D. N.Y., 3 F. 2d 824; *Moran Towing & Transportation Co. v. The Reading Co.*, D.C. S.D. N.Y., 158 F. Supp. 781. Furthermore, the section is limited to discharges "before commencement of the voyage or before one month's wages are earned," and is inapplicable, since the discharges occurred after the commencement of the voyage to the Dry Dock at Mobile for repairs, and after a month's wages had been earned.

The SS Amigo is owned by Appellant, a Liberian corporation, 100 per cent of whose stock is, in turn, owned by Paul Slavin, a citizen of Argentina. Section 596 is applicable to foreign seamen serving on foreign vessels. Appellees, citizens of Norway, are within the protection of that section. *The Fletero v. Arias*, 4 Cir., 206 F. 2d 267, cert. den. 346 U. S. 897, 74 S. Ct. 219, 98 L. Ed. 398, and *The Sonderborg*, 4 Cir., 47 F. 2d 723, cert. den. 284 U. S. 618, 52 S. Ct. 7, 76 L. Ed. 527. The section is not inapplicable, as Appellant contends, because Appellees did not sign on before a Commissioner as authorized by Section 563.

Title 46, U.S.C., Chapter 18, §§ 541-681[4] of which Section 563 is a part, dealing with merchant seamen, including shipping commissioners, generally applies only to seamen employed on board American-owned vessels, except where Congress has specifically provided to the contrary. *Ktistakis v. Liberian SS Star*, 4 Cir., 304 F. 2d 356.[5] Such limited

[4]Title 53, Revenue Stat., §§ 4501-4612

[5]The Court noted that Section 596 was so interrelated to Sections 597 and 599, which specifically cover foreign seamen, that it was logical to hold that the former also applied to foreign seamen

applicability of Chapter 18 becomes apparent when considered with Section 713,* also a part thereof. *Ktistakis*, supra; *The Montapedia*, D.C. La., 14 F. 427; *United States v. Minges*, S.C. Cir. Ct., 16 F. 657; *The Elswick Tower*, D.C. Ga., 241 F. 706.

Appellant further contends that by virtue of Section 544 which renders inapplicable Section 596, where the vessel is engaged "in trade between the United States and the British North American possessions," that Appellees are not entitled to penalty wages, claiming that the Amigo was under a charter when it left Pascagoula to load railroad cross ties in Mobile for Seven Rivers, Canada.

Slavin testified that when the vessel discharged its cargo at Pascagoula, she was ordered to proceed to Mobile, "where, *we were entering* into a contract to carry creosote railroad ties from Mobile, Alabama, to Seven Rivers, Canada."

When the vessel sailed from Pascagoula she was bound for the Alabama Dry Dock for repairs. She arrived at Mobile disabled. According to Slavin, the owners were unable to get an extension of time within which they "could commence to carry" the ties. There was no other employment immediately available for the vessel. The owners decided to lay her up. The crew, except the master and Ap-

*Providing in part:

"In the construction of title 53 of the Revised Statutes [Title 46, U.S.C., Chapter 18], every person having the command of any vessel *belonging to any citizen of the United States* shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity *on board the same* shall be deemed and taken to be a 'seaman' . . ." (Emphasis supplied.)

pellees, was discharged. The vessel never began a voyage to Canada. Appellees never undertook such a voyage, but remained aboard performing their duties until they were discharged on January 21, 1959, weeks prior to which the Canadian contract had been canceled. No cargo was loaded or was available for loading at that time, and none was ever loaded for ports in Canada.

Appellees' contracts were for services in the "Gulf Trade —West Indies and Overseas Trade" and they were bound to the vessel for a period of one year to go to any place in the world where the vessel might be ordered. A conclusion that the vessel was *engaged* in trade between the United States and the British North American possessions during the period of December 4, 1958, to January 21, 1959, when Appellees were aboard her, does not square with the facts or the realities of the situation and cannot be sustained.

The lower court correctly ruled that the tender of wages did not stop the penalty provisions of Section 596, since the tenders were conditioned upon the signing of a full release of all claims. A seaman is entitled to penalty wages if the wages concededly due are tendered only upon such a condition. *Mandelin v. Kenneally*, 4 Cir., 11 F. 2d 344; *The Fletero v. Arias*, supra; *Prindes v. The SS African Pilgrim*, 4 Cir., 266 F. 2d 125.

The findings of a trial court, sitting without a jury in admiralty, will not be reversed unless clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20; *Commerce Oil Corp. v. Dixie Carriers, Inc.*, 5 Cir., 252 F. 2d 386.

The lower court found that there was not a sincere bona fide offer of reemployment and, if there was such, that the existing circumstances constituted reasonable grounds for the rejection of same. These findings, as others, rest on adequate support in the evidence and are not clearly erroneous.

Although the case was not heard until February 3, 1961, the court found that with the exercise of due diligence by Appellees, the action could have been heard on February 26, 1960, the date the action was assigned its first trial date. Penalty wages were computed to that date.[7] The court, feeling that "the equities of the matter dictated some modification," entered judgment for each for $2,000.00 less than the computation.

The time for which the penalty provision runs, rests within the sound discretion of the court and depends upon the equities of the case. *Forster v. Oro Navigation Co.* [See Footnote 7 below.]; *Mystic S.S. Co. v. Stromland*, 4 Cir., 20 F. 2d 842, cert. den. 276 U. S. 618, 48 S. Ct. 213, 72 L. Ed. 734. We find no abuse of discretion in the award of penalty wages. The award was in keeping with all of the equities, and the judgment is

AFFIRMED.

[7]The Victoria, D.C. S.D. N.Y., 76 F. Supp. 54; Reversed on other grounds, 172 F. 2d 434; Forster v. Oro Navigation Co., D.C. S.D. N.Y. 128 F. Supp. 113, Aff'd 228 F. 2d 319.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19927

D. C. Docket No. 2692 Adm.

CARIBBEAN FEDERATION LINES, Claimant,

Appellant,

versus

KARHL DAHL and HJALMAR WIIK,

Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before JONES and BELL, Circuit Judges, and GROOMS, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the Appellant, Caribbean Federation Lines, Claimant, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 29, 1963

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 19,927

CARIBBEAN FEDERATION LINES, Claimant,

Appellant

vs

KARHL JAHL and HJALMAR WIIK,

Appellees

Appeal from the United States District Court for the Southern District of Alabama

(May 22, 1963)

ON PETITION FOR REHEARING

Before JONES and BELL, Circuit Judges, and GROOMS, District Judge GROOMS, District Judge

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

AFFIDAVIT OF SERVICE

I, Sandra Kay McWhorter, a stenographer in the office of Messrs. Hamilton, Denniston, Butler and Riddick, attorneys of record for Petitioner herein, depose and say that on the _____ day of July, 1963, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Fifth Circuit Court of Appeals on Karl Dahl and Hjalmar Wiik, Respondents herein, by delivering the same to a clerk in the office of Ross A. Diamond, Esq., counsel of record for said Respondents, located at Van Antwerp Building, Mobile, Alabama.

Subscribed and sworn to before me at Mobile, Alabama, this _____ day of July, 1963.

Notary Public, Mobile County,
Alabama

Office-Supreme Court, U.S.
FILED
AUG 28 1963
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 319

CARIBBEAN FEDERATION LINES,
Petitioner,

versus

KARL DAHL and HJALMAR WIIK,
Appellees.

Brief of Appellees in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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SUPREME COURT OF THE UNITED STATES

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No. 319

CARIBBEAN FEDERATION LINES,
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versus

KARL DAHL and HJALMAR WIIK,
Appellees.

Brief of Appellees in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

In addition to the statement of the case as outlined by the Petitioner, Appellees respectfully submit the following:

There is only one contract of employment on each of the Appellees. It is for the one year period beginning November 15, 1958, terminating November 15, 1959. The engagement was for the Gulf Trade – West

Indies and Overseas Trade and could be terminated by either party upon giving fourteen days notice after one year (R63, Libelants' Exhibit 1).

The SS AMIGO was never engaged in trade between the United States and the British North American Possessions. It had never taken on a single article of cargo for Canada. The vessel after it had discharged its cargo from South America in Pascagoula, Mississippi proceeded to Mobile "where we were entering into a contract to carry creosote railroad ties from Mobile, Alabama to Seven Rivers, Canada" (R74). They were unable to get an extension of time within which they "could commence to carry" the ties (R76).

The SS AMIGO at the times in question was a Liberian flag vessel owned by Caribbean Federation Lines, which in turn was owned in its entirety by Raul Slavin, a citizen of Argentina (R89, 90).

ARGUMENT

POINT I

Findings of fact of the District Court should not be reversed unless clearly erroneous.

It is established law that the findings of fact of the District Court should not be reversed unless clearly erroneous. Further, it is upon the Petitioner to show that such findings were clearly erroneous. *McAllister v. The United States*, 348 U.S. 19, 99 L.Ed. 20.

It is obvious upon reviewing the evidence that what happened in this case was simply as the Court below has found. That is, that the Appellees were signed to a one year contract by the Master of the SS AMIGO for service in the Gulf Trade – West Indies and Overseas Trade; brought to the United States where they joined the vessel in Pascagoula, after the vessel finished discharging at Pascagoula it came on to Mobile; that shipping was bad and the vessel's owners could not obtain cargo for the vessel. Thereupon they decided to discharge the men and return them to Norway. The Appellees reported to the Petitioner's office in New York and their wages were tendered them upon the condition that they sign a full and complete release of any and all claims. After some time had elapsed the Immigration Authorities persuaded the Petitioner to repatriate the men. The Petitioner to this date has never offered to pay the Appellees wages that were due them upon discharge without the condition of release. We respectfully submit that the Findings of Fact of the Court below are entirely proper and that most certainly they are not clearly erroneous.

POINT II

A defense not set up in the answer may not be urged on Appeal.

The answer of Petitioner to Appellees' claim for penalty wages under 46 U.S.C.A. 596 is but a general denial (R27). At no time during the trial of the cause in the District Court or in arguments to that Court was it urged by the Petitioner that Appellees were not

entitled to recover due to the restrictive conditions set out in 46 U.S.C.A. 544. It was urged for the first time on Appeal to the Fifth Circuit Court of Appeals that (1) the vessel was engaged in a coastwise voyage at the time in question, or (2) that it was engaged in the trade between the United States and the British North American Possessions, and thus Appellees do not come under the provisions of 46 U.S.C.A. 596. These are clearly affirmative defenses and if not pleaded, should not be considered on appeal. *Benedict on Admiralty*, Sixth Ed., Vol. 4, Sec. 573; *McAllister v. The United States*, 348 U.S. 19; 99 L. Ed. 20, *Federal Rules of Civil Procedure*, Rule 52 (a), *Commerce Oil Corp. vs. Dixie Carriers*, 252 F. 2nd. 386.

POINT III

A foreign owned vessel is prohibited from engaging in the coastwise trade.

The SS AMIGO was a Liberian flag vessel owned by Caribbean Federation Lines, which in turn was owned by Raul Slavin, a citizen of Argentina. The SS AMIGO moved no cargo in the coastwise trade, nor was it ever engaged in the coastwise trade. 46 U.S.C.A. 883, 808 and 11 prohibit such a vessel from engaging in the coastwise trade.

There was only one contract of employment in existence by and between the Appellees and the Petitioner. This contract was for a period of one year for service in the Gulf Trade – West Indies and Overseas Trade. The Appellees were bound by their con-

tract of employment or Articles of Employment to sail with this ship to any parts of the world directed by the Petitioner. The vessel was prohibited by law from engaging in a coastwise trade and there has been absolutely no finding that it was so engaged. Therefore, this decision could in no manner be considered as being in conflict with *Gardner* v. *L. N. Danzler*, 281 F. 2nd. 719.

Assuming for the sake of argument that the vessel was considered to be in the coastwise trade, it is respectfully submitted that the case of *Carson v. Gulf Oil Corporation*, 123 So. 2nd 35, distinguishes the instant case from the *Gardner* case, and in fact, no conflict would exist.

POINT IV

The SS AMIGO was not engaged in trade between the United States and the British North American Possessions.

The contracts of employment of the Appellees were for a period of one year in the Gulf Trade – West Indies and Overseas Trade, and they were bound to the vessel for a period of one year for any place in the world where the vessel was ordered to go. Not one ton of cargo was loaded aboard the SS AMIGO for Canada. True, the Petitioner alleges that it had planned to carry a cargo to Canada. However, this contract was never entered into and as the shipping business was bad at the time, no cargo being available for the vessel for any ports in the world, it was decided to lay up the vessel. The position of the

Petitioner is clearly inconsistent with the facts of the case.

Assuming only for the sake of argument that the Petitioner could successfully maintain that the Appellees were on articles between Canada and the United States, then again, the Appellees insist that the Petitioner's position would again meet with failure. Congress amended 46 U.S.C.A. 596 in 1898 by interpolating a provision for coasting voyages before the provisions for voyages between Atlantic and Pacific ports and foreign ports. It is respectfully submitted that this Amendment intended to bring within Section 596 all coastwise voyages or coasting voyages, including voyages along the coast of the United States and Canada. For if such were not the intention of Congress we would find ourselves in this position: Section 596 would apply in a coastwise voyage from Jacksonville to New Orleans; it would apply to a coastwise voyage from Houston to New York or in a coastwise voyage from the Pacific coast to New York, but Section 596 would not apply in a voyage from Houston to Quebec and it would not apply in a voyage from San Francisco to Quebec. We can find no authorities interpreting Section 596 as amended in respect to its applicability to coasting voyages between the United States and Canada. However, it is respectfully submitted that Congress in its amendment of 1898 intended to bring such voyages within the Act.

POINT V

Appellees are within the class of seamen entitled to recover wages under 46 U.S.C.A. 596.

The findings of the District Court sitting without a jury in Admiralty, should not be reversed unless clearly erroneous. *McAllister v. United States*, supra. It is abundantly clear from the record that Appellees are entitled to penalty wages under Section 596. *The Fletero v. Arias*, 206 Fed. 2nd.267, Certiorari Denied, 346 U.S. 896; *Prindes v. The SS AFRICAN PILGRIM*, 266 Fed. 2nd. 125; *Mandelin*, et al v. *Kenneally*, et al, 11 Fed. 2nd. 344; *Forster v. Oro Navigation Co.*, 128 Fed. Supp. 113.

POINT VI

The Petition for Writ of Certiorari fails to affirmatively establish the requisite, special and important reasons for the granting of same.

Paragraph 1 of Rule 19 of Supreme Court Rules, 28 U.S.C.A., provides that a review on Writ of Certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are "special and important reasons therefor." The category of "special and important reasons" has been held to be those which "imply a reach to a problem beyond the academic or episodic," *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955). The Petitioner states nothing in the Petition for a Writ of Certiorari which comes within the category of "special and important reasons" for the granting of same.

CONCLUSION

It is felt that it has effectively been shown that no conflict exists in this case or could exist under the facts of this case with any other decision of the Court of Appeals. In addition, it is submitted that the Petition falls in its entirety in its efforts to establish any special and important reasons for the granting of same. It is therefore respectfully requested that the Petition for Writ of Certiorari be denied.

DIAMOND, ENGEL & LATTOF

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New Orleans, Louisiana

Of Counsel

AFFIDAVIT OF SERVICE

I, Ross Diamond, Jr., Proctor for Appellees, depose and say that on the _____ of August, 1963, I served a copy of the foregoing Brief in opposition to Petition for Writ of Certiorari on the Petitioners herein by delivering a copy of same to Harry H. Riddick, counsel of record for said Petitioner, at his office in the American National Bank Building, Mobile, Alabama.

_____

Ross Diamond, Jr.

Subscribed and Sworn to before
me at Mobile, Alabama, this ___
day of August, 1963.

_____

NOTARY PUBLIC, MOBILE COUNTY, ALABAMA